

Lloyd Bernstein, OSB #002030
E-mail: lloyd.bernstein@bullivant.com
BULLIVANT HOUSER BAILEY PC
300 Pioneer Tower
888 SW Fifth Avenue
Portland, Oregon 97204-2089
Telephone: 503.228.6351
Facsimile: 503.295.0915
Attorneys for Plaintiffs American Economy
Insurance Company and American Fire and
Casualty Company

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

AMERICAN ECONOMY INSURANCE
COMPANY, and AMERICAN FIRE AND
CASUALTY COMPANY,

Plaintiffs,

v.

NW BUILDING FORENSICS, LLC, and
EAGLE RIDGE TOWNHOMES OWNERS'
ASSOCIATION,

Defendants.

Civil No.: _____

**COMPLAINT FOR DECLARATORY
JUDGMENT**

Plaintiff American Economy Insurance Company (“American Economy”) and
Plaintiff American Fire and Casualty Company (“American Fire”), hereby allege as follows:

PARTIES

1. American Economy is an Indiana corporation with its principal place of

Bullivant|Houser|Bailey PC

300 Pioneer Tower
888 SW Fifth Avenue
Portland, Oregon 97204-2089
Telephone: 503.228.6351

COMPLAINT FOR DECLARATORY JUDGMENT

Page 1

business in Massachusetts, and an insurance company authorized to do business in Oregon.

2. American Fire is a New Hampshire corporation with its principal place of business in Massachusetts, and an insurance company authorized to do business in Oregon.

3. Upon information and belief, NW Building Forensics, LLC (“NW Building Forensics”) is an Oregon limited liability company with its principal place of business in Oregon and its individual members are residents of Oregon.

4. Upon information and belief, Eagle Ridge Townhomes Owners’ Association (“Eagle Ridge”) is an Oregon corporation with its principal place of business in Oregon.

JURISDICTION AND VENUE

5. There is complete diversity between the plaintiffs and defendants and the Court has jurisdiction pursuant to 28 U.S.C. § 1332 (Diversity of Citizenship) and 28 U.S.C. § 2201 (Declaratory Judgment).

6. NW Building Forensics is a respondent in the AAA arbitration of *Eagle Ridge Townhomes Owners’ Ass’n v. NW Building Forensics, LLC, Robert Harp, Malcolm Brent Williamson, and Stephen Winsted* (the “Arbitration Claim”), which seeks damages in the amount of \$2,290,007.60. NW Building Forensics has tendered the Arbitration Claim to American Economy and American Fire for defense and indemnity. NW Building Forensics thus seeks from American Economy and American Fire defense and indemnity liability insurance coverage in excess of \$75,000.

7. Pursuant to a complete reservation of rights under their respective policies, including the right to seek a judicial determination of such rights, American Economy and American Fire have agreed to defend NW Building Forensics in the Arbitration Claim.

8. This declaratory judgment action concerns insurance coverage issues raised by NW Building Forensics’ tender of the Arbitration Claim, including whether American

Economy and American Fire have any obligation to defend or indemnify NW Building Forensics in the Arbitration Claim.

9. Venue in the District of Oregon, Portland Division, is proper under 28 U.S.C. § 1391 and Local Rule 3-2(b) because NW Building Forensics and Eagle Ridge are residents of Oregon, being subject to suit in this District and having their respective principal places of business in Oregon, and a substantial part of the events or omissions giving rise to Plaintiffs' claim for a declaratory judgment occurred in the Portland Division, including the issuance of the insurance policies and NW Building Forensics' demand for a defense and indemnity in the Arbitration Claim.

INTRODUCTION

10. American Economy issued to the named insured NW Building Forensics a businessowners insurance policy with a policy period of 09/01/2015 to 09/01/2016 (policy no. 02-BP-918322-6) (the "American Economy Policy"). A copy of the relevant portions of the American Economy Policy is attached hereto as Exhibit 1.

11. American Fire issued to the named insured NW Building Forensics a businessowners insurance policy with a policy period of 09/01/2016 to 09/01/2017 (policy no. BZA (17)57305735), a businessowners insurance policy with a policy period of 09/01/2017 to 09/01/2018 (also policy no. BZA (17)57305735), and a businessowners insurance policy with a policy period of and 09/01/2018 to 09/01/2019 (also policy no. BZA (17)57305735) (collectively the "American Fire Policies"). Copies of the relevant portion of the American Fire Policies are attached hereto as Exhibit 2.

12. The provisions of the American Economy Policy and of the American Fire Policies (collectively the "Policies"), respectively, are substantially similar.

13. Eagle Ridge has filed in the Arbitration Claim a Claimant's Statement of Claim incorporating a contract between NW Building Forensics and Eagle Ridge (the

“Contract”) and seeking damages in the amount of \$2,290,007.60. A copy of the Claimant’s Statement of Claim is attached hereto as Exhibit 3 (“Statement of Claim”).

14. Upon information and belief, sometime prior to 2015, Eagle Ridge made defective construction claims against the developers of the townhomes. After those claims were resolved, according to the Statement of Claim, Eagle Ridge began searching for “an expert to advise Eagle Ridge during the entire process relating to the extensive remediation of the defective construction work; and for a construction management services consultant specializing in project management of remediation of defective construction work.”

15. According to the Statement of Claim, in the spring of 2015, Eagle Ridge hired NW Building Forensics to “inspect and appraise the Eagle Ridge Townhomes to prepare a building envelope rehabilitation consulting services proposal.” NW Building Forensics described two alternatives in its proposal: a Design/Build approach and a Design/Bid/Build approach. The Contract ultimately entered between Eagle Ridge and NW Building Forensics adopted the Design/Build approach.

16. According to the Contract, NW Building Forensics was to provide the following services to Eagle Ridge during the remediation of the townhomes:

DESIGN/BUILD

Phase 1 – Pre-construction support and design review.

Phase 2 – Bid support and Bid Analysis.

Phase 3 – Contract Administration and field oversight during construction.

Phase 4 – Preparation and submission of closeout documents.

17. According to the Statement of Claim, in July 2016, Eagle Ridge hired Lifetime Exteriors to do “Building envelope rehabilitation per minimum standards and scope” per a remediation scope developed by NW Building Forensics.

18. According to the Statement of Claim, in August 2017, Eagle Ridge learned that the project “was suddenly nearly \$1,000,000 over budget with significant work yet to be completed.”

19. The Statement of Claim alleges that “Respondents’ actual performance of the expert services and construction management services rendered for each of the phases set out in the AIA Contract proved to be deficient in nearly all aspects of the Project.”

20. The Statement of Claim further alleges NW Building Forensics work was “deficient” in that it “overcharged by \$1,224,432.60 for an unfinished Project that included significant additional defective construction, and ongoing life safety issues.”

21. The Statement of Claim also asserts a “Negligence” claim, asserting that “Respondents, each of them, were negligent in failing to provide adequate and accurate construction management as set forth in the AIA Contract in a manner consistent with the applicable community and industry standards.” The damages sought are the same as for the Breach of Contract claim.

FIRST CLAIM FOR RELIEF
(Declaratory Judgment – No Property Damage)

22. Plaintiffs incorporate by reference and re-allege the allegations contained in the preceding paragraphs.

23. Subject to other provisions therein, Section II – Liability of the Policies’ coverage form provides in part that “[w]e will pay those sums that the insured becomes legally obligated to pay as damages because of . . . ‘property damage’ . . . to which this insurance applies” and that “[w]e will have the right and duty to defend the insured against any ‘suit’ seeking those damages.” It further so provides that “[t]his insurance applies . . . to ‘property damage’ only if . . . [t]he . . . ‘property damage is caused by an ‘occurrence’”

24. “Property damage” is defined in part therein as “[p]hysical injury to tangible

property, including all resulting loss of use of that property” or “[l]oss of use of tangible property that is not physically injured.”

25. The Statement of Claim does not allege or seek damages for any “property damage” within the meaning of the Policies.

26. The absence of any alleged “property damage” within the meaning of the Policies precludes any liability insurance coverage thereunder for the claims made against NW Building Forensics in the Arbitration Claim.

27. Accordingly, Plaintiffs are entitled to a declaration that NW Building Forensics is not entitled to insurance coverage for any claims against it in the Arbitration Claim since such claims do not allege “property damage” as the term is defined in the Policies, and that Plaintiffs are not obligated to defend or to indemnify NW Building Forensics (or any other entity) in the Arbitration Claim.

SECOND CLAIM FOR RELIEF
(Declaratory Judgment - Professional Services Exclusion)

28. Plaintiffs incorporate by reference and re-allege the allegations contained in the preceding paragraphs.

29. Section II – Liability of the Policies’ coverage form also includes a Professional Services Exclusion providing in part as follows:

B. Exclusions:

1. Applicable To Business Liability Coverage

This insurance does not apply to . . . [:]

j. Professional Services

“Bodily injury,” “property damage” or “personal and advertising injury” caused by the rendering or failure to render any professional services. This includes but is not limited to . . . [:]

(2) Preparing, approving, or failing to prepare or

approve maps, drawings, opinions, reports, surveys, change orders, designs or specifications;

(3) Supervisory, inspection or engineering services

....

30. Even if the Statement of Claim alleged or sought damages for “property damage” within the meaning thereof, the Professional Services Exclusion in the Policies would bar any liability coverage thereunder for the claims made against NW Buildings Forensics in the Arbitration Claim.

31. Accordingly, Plaintiffs are entitled to a declaration that NW Building Forensics is not entitled to insurance coverage for any claims against it in the Arbitration Claim since coverage therefor is barred by the Professional Services Exclusion in the Policies, and that Plaintiffs are not obligated to defend or to indemnify NW Building Forensics (or any other entity) in the Arbitration Claim.

THIRD CLAIM FOR RELIEF

(Declaratory Judgment – Business Risk Exclusions)

32. Plaintiffs incorporate by reference and re-allege the allegations contained in the preceding paragraphs.

33. Section II – Liability of the Policies’ coverage form also includes Business Risk Exclusions providing in part as follows:

B. Exclusions

1. Applicable to Business Liability Coverage

This insurance does not apply to . . . [:]

k. Damage to Property

“Property damage” to . . . [:]

(5) That particular part of real property on which you or any contractor or subcontractor working directly or indirectly on your behalf is performing operations, if the “property damage” arises out of those operations; or

(6) That particular part of any property that must be restored, repaired or replaced because “your work” was incorrectly performed on it. . . .

Paragraph (6) of this exclusion does not apply to “property damage” included in the “products completed operations hazard”. . . .

m. Damage To Your Work

“Property damage” to “your work” arising out of it or any part of it and included in the “products- completed operations hazard”.

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

34. Even if the Statement of Claim alleged or sought damages for “property damage” within the meaning thereof, the Business Risk Exclusions in the Policies would bar any liability coverage thereunder for the claims made against NW Building Forensics in the Arbitration Claim.

35. Accordingly, Plaintiffs are entitled to a declaration that NW Building Forensics is not entitled to insurance coverage for any claims against it in the Arbitration Claim since coverage therefor is barred by the Business Risk Exclusions in the Policies, and that Plaintiffs are not obligated to defend or to indemnify NW Building Forensics (or any other entity) in the Arbitration Claim.

PRAYER FOR RELIEF

WHEREFORE, PLAINTIFFS PRAY FOR JUDGMENT AS FOLLOWS:

1. Declaring that Plaintiffs have no obligation to defend NW Building Forensics in the Arbitration Claim;
2. Declaring that Plaintiffs may discontinue defending NW Building Forensics in the Arbitration Claim;

3. Declaring that NW Building Forensics is obligated to reimburse Plaintiffs for the attorney fees and costs they have expended to date in defending NW Building Forensics in the Arbitration Claim;

4. Declaring that Plaintiffs have no obligation to indemnify NW Building Forensics in or relative to the Arbitration Claim; and

5. For Plaintiffs' costs and disbursements incurred herein and such other and further relief as this Court deems just.

DATED: September 11, 2019

BULLIVANT HOUSER BAILEY PC

By s/ Lloyd Bernstein
Lloyd Bernstein, OSB #002030
Telephone: 503.228.6351
Attorneys for Plaintiffs American Economy
Insurance Company and American Fire and
Casualty Company

4849-2524-1764.1